

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHANNON DAVES, et al., (CAUSE NO. 3:18-CV-154-N
Plaintiffs,)
(
vs.)
(DALLAS, TEXAS
DALLAS COUNTY, TEXAS, et al.,) FEBRUARY 7, 2019
Defendants. (10:00 A.M.

HEARING ON MOTION TO MODIFY OR CLARIFY
ORDER FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE DAVID GODBEY
UNITED STATES DISTRICT JUDGE

SHAWN M. McROBERTS, RMR, CRR
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A P P E A R A N C E S

(Only Parties Who Spoke)

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MR. PHILIP MORGAN

1 THE COURT: Be seated.

2 Good morning.

3 MS. DAVID: Good morning.

4 THE COURT: So I tried to figure out if there was
5 some better way to do this than having everybody come here and
6 this really -- notwithstanding that some of you have to
7 travel, this seemed like probably the most efficient way to do
8 this.

9 I've looked briefly at the stuff that was filed I believe
10 yesterday, and I see that now you want me to clarify as
11 opposed to modify the injunction. I appreciate that.

12 Honestly I've got some concerns about that. Let me just tell
13 you my thinking on that point first, and then we can go
14 forward on the other issues.

15 As I read *Sierra Club*, it says a couple of times that my
16 power to alter the injunction is limited to maintaining the
17 status quo. I understand that the context there was a little
18 different--that the injunction, or preliminary injunction
19 there, was to stop people from doing something; so when it's
20 pending, if they figured out an end-way around it, arguably,
21 and I -- my goal is still to stop them from doing that, I
22 ought to be able to stop the end-run in order to preserve the
23 status quo. That's the context that I understand to be there.

24 It's a little different here, where we're dealing with a
25 mandatory injunction that doesn't say, Stop doing that; it

1 says, Okay, now I'm going to require you to go do a bunch of
2 stuff you weren't doing before. But I'm still faced with the
3 language with the Fifth Circuit that my power to alter an
4 injunction is limited to maintaining the status quo.

5 My sense is that the collective wisdom is that the
6 subject matter of the modifications that everybody is asking
7 for don't really have any material bearing on what the Court
8 of Appeals is addressing in the appeal from the PI, and I tend
9 to think that's probably correct.

10 Here's what makes me nervous. The language in all these
11 cases is in the form of a notice of appeal divests the
12 district court of jurisdiction over the subject of the appeal,
13 and here I think the subject of the appeal is the preliminary
14 injunction so the facial impact of that is I'm divested of
15 jurisdiction over the preliminary injunction.

16 There's this carve-out for maintaining the status quo,
17 but I don't think you-all are asking me to maintain the status
18 quo, so it looks like to me, arguably, facially I don't have
19 jurisdiction to fiddle with it. I understand in some
20 circumstances the joint motion. You-all say, We've got
21 together and we all agree you can do it; we agree you can do
22 it. The problem I have is if I'm divested of jurisdiction,
23 you-all can't confirm jurisdiction on me by your agreement.
24 Right? That's Hornbook.

25 So even though you agree today, it's not been unusual in

1 my experience that parties that at one point agree may later
2 disagree, and you can't waive subject matter jurisdiction, so
3 if somebody gets grumpy about the changes I've made down the
4 road, nothing would stop that party from saying, Godbey didn't
5 have subject matter jurisdiction; the orders modifying the
6 injunction are void, and that doesn't do anyone any good.

7 That all said, what's the alternative? We're -- before
8 I've done anything yet, and it seems to me like the easy
9 alternative is for one or all of you to either file a motion
10 or write a letter to the Court of Appeals and say, Judge
11 Godbey is all anxious and scaredy-cat and doesn't think he can
12 rule on these motions; could you please reassure him that he
13 does not need your permission; or, alternatively, if he does
14 need your permission, would you give him your permission to go
15 ahead and rule on these motions.

16 I don't think that would introduce any significant delay
17 of this. I think they're pretty responsive on stuff like
18 that. And if I had their blessing to rule on these, I would
19 be ready to issue an order in a matter of days once I get
20 their approval.

21 So on the first issue, set aside--which we'll get to in a
22 moment--merits of any of the motions to modify--I think where
23 I come out is I would really prefer for one or all of you,
24 preferably all of the people filing motions, to file a joint
25 something or another with the Court of Appeals saying, Give

1 Judge Godbey guidance--either tell him he doesn't need your
2 permission or he's got your permission. Wouldn't it be
3 interesting if they said, He needs our permission and we're
4 not going to give it to him. That would be a real wake-up
5 call. It seems unlikely, but that's certainly a possibility.

6 So those are my thoughts on the first issue. What do you
7 guys think? Don't be bashful.

8 MS. COHN: Good morning, Your Honor.

9 So thank you for thinking about this issue so closely. I
10 understand your concern, and I think that there is certainly
11 language in *Sierra Club* that -- concerning divestment of
12 jurisdiction.

13 I would point the Court -- and we're happy to provide
14 supplemental briefing on it if it's helpful or, instead, if
15 you'd prefer just to reach out to -- or file a motion before
16 the appeals court.

17 It does seem to me both from *Sierra Club* and from the --
18 some of the discussion in *Coastal Corp*, which is 869 F.2d 817,
19 that the rationale for the status quo sort of exception under
20 Rule 62(c) is an intention to make sure that the relationship
21 between the parties does not change in a way that would
22 materially affect the appeal. So I would agree with your
23 assessment earlier that, you know, this seems like something
24 that does not affect the relationship between the parties, but
25 certainly if you'd like for us to file that motion, we're

1 happy to do so.

2 THE COURT: It just seems in the long run that
3 little extra time would probably be worth it to avoid the
4 potential of big problems down the road.

5 MS. COHN: Sure. Absolutely.

6 Thank you, Your Honor.

7 THE COURT: Yeah. What says --

8 Yes, ma'am?

9 MS. COHN: I'm sorry. I didn't mean to walk away
10 when you were speaking.

11 THE COURT: That's quite all right. I was calling
12 up the on-deck batter.

13 MS. DAVID: So I just wanted to point out on one of
14 our motions for -- or one of our requests for clarification,
15 and that is the clarification that the order is not requiring
16 three hearings. That's an issue that is really time sensitive
17 and important, because the status quo today is we are only
18 having two hearings. And in the *Sierra Club* case they talk
19 about you should only modify an injunction to achieve the
20 original purposes of the injunction.

21 We are in a unique situation here where the injunction
22 was based on the *O'Donnell* Fifth Circuit injunction, and I
23 think when you look at the details in this case -- and keep in
24 mind that we're both involved in that case, and the State is
25 not involved in it so they don't have the benefit of the

1 background that we do. In that case what they're talking
2 about the first -- what the State believes is the first
3 hearing is a process called early presentment, which in Harris
4 County is when someone is presented on the papers to a judge,
5 there's no hearing. And the language -- I think the plain
6 language of your order doesn't say there has to be a hearing.
7 It just says if somebody isn't released early on, then they
8 have to have this individualized hearing. And what O'Donnell
9 is talking about is the importance of the that individualized
10 hearing within 48 hours.

11 And so I don't think clarifying would change anything,
12 and I think it would achieve the original purposes of the
13 injunction. And, frankly, right now the reading that the
14 State has of the order is causing a lot of confusion and a lot
15 of problems just logistically on the ground.

16 So that's the only one that I think is time sensitive and
17 very important to deal with now, and I think you certainly can
18 under *Sierra Club*.

19 But if you don't want to, and you want to be careful,
20 which I certainly appreciate and understand, just procedurally
21 I think it's important that you actually deny our motions for
22 us to get it to the Fifth Circuit. I think procedurally we
23 have to have that in order to move to that next step and ask
24 them to give you permission to do so. So we would ask that
25 you would take that step and just deny the pending motions.

1 THE COURT: Okay. I'm denying all of the pending
2 motions to modify without prejudice due to my concern that I
3 lack jurisdiction to address them. If I am incorrect and the
4 Court of Appeals clarifies that, I am happy to rule on the
5 merits virtually instantly, but I presently believe, given the
6 facial language in *Sierra Club*, that I do not have
7 jurisdiction to address them.

8 MS. DAVID: Okay. We appreciate that. Thank you.

11 MS. DAVID: I think we can, yes, Your Honor.

15 MS. DAVID: Absolutely. And we will get that on
16 file ASAP.

17 THE COURT: Okay. Great.

18 MS. DAVID: I'm not sure if the State might be in
19 opposition, but.

20 MR. HUDSON: If you would like to hear from me for a
21 second?

22 THE COURT: Sure.

23 MR. HUDSON: We obviously filed a piece on
24 jurisdiction yesterday. I'm sure the Court had a chance to
25 take a look at it.

1 THE COURT: No.

2 MR. HUDSON: It was the bench memorandum that we
3 filed around 4:00 in the afternoon.

4 THE COURT: Nope; didn't see that one.

5 MR. HUDSON: I've got a copy of that as well I can
6 provide the Court now. It's been filed with them. If you'd
7 like to take a look, I can hand you my copy. I know you don't
8 want to read it right this second, but I can explain it fairly
9 quickly.

10 THE COURT: Go.

22 And so the reason that we oppose this on jurisdictional
23 grounds, as we stated in the bench memorandum, is this isn't
24 just an issue of the jurisdiction about the status quo; this
25 is also they're inviting you to make changes--for instance,

1 having one hearing instead of two--based on evidence that
2 wasn't presented that they now want to present to the Court
3 through some sort of modification motion that's going to
4 create issues like a Sixth Amendment problem when it comes to
5 appointing counsel.

6 As you just heard from the County, their biggest gripe is
7 that we're not giving them attorneys at magistration hearings,
8 and they're saying, Well, this isn't like Houston. Nobody
9 made that argument to the Court at the PI hearing. Nobody
10 presented evidence that this was different from Houston at the
11 PI hearing. Now they say, We want to come in and describe for
12 the Court a completely different scenario and have this Court
13 modify the injunction to create something different than
14 *O'Donnell* based on evidence that was never presented.

15 So it's our position that, even if this Court wanted to
16 clarify, modify, whatever language you want to use, the status
17 quo at this point is the constitutional floor, which is
18 *O'Donnell*. If everybody's in compliance with *O'Donnell*,
19 there's no need to clarify or modify just because they have an
20 idea about how they want to operate.

21 If the parties are in agreement about what they want to
22 do, there's nothing stopping them from going beyond the
23 injunction. Right? They could come together and have
24 whatever powwow that they want about whatever they want to put
25 in place, so long as it complies with the order, if they want

1 to go above and beyond. It doesn't require an injunction from
2 this Court for the parties to do something that they want to
3 do that's both constitutional and in compliance.

4 And So from our perspective, we don't think that this
5 Court has jurisdiction, and we believe that clarifying,
6 modifying, whatever language you want to slap on it, is really
7 just going to create a mismatch between what's currently
8 happening and what the parties want to happen. That's not the
9 status quo.

10 THE COURT: Okay. I appreciate that. And I think
11 in many respects that's why I indicated the ruling I did.

12 He raises an issue that I had wanted to explore with
13 you-all. Have you looked at how much of this stuff in the
14 joint motion you could just do by agreement without my
15 involvement?

16 MS. DAVID: We have, and I think anything we could
17 do by agreement we would do, but we can't do it without the
18 State's agreement as well, some of the things, and because
19 they have a different interpretation of the order than we
20 do -- and just to briefly address what he was talking about
21 with the Public Defenders, which I didn't talk about at all --

22 THE COURT: Can you give me an example of one that
23 you don't think you can do by agreement because they have a
24 different reading of it?

25 MR. HUDSON: If I could approach?

1 MS. DAVID: So if you look at the State's order that
2 is maybe what he's handing you, I don't know, Exhibit 2 to
3 Docket Entry No. 186, the State -- the district court judges
4 interpret your order to require three hearings, we think.
5 It's very unclear from their order. They first talk about an
6 individualized hearing and bail review under 1517 in Lew
7 Sterrett, then later they seem to think that's two, and later
8 they seem to think there's a bail hearing that happens after
9 1517 in Lew Sterrett, that there are two hearings. And
10 they're sending orders telling us what has to happen at this
11 second hearing that doesn't actually occur.

12 So it's creating some confusion and problems, when now
13 we're talking about adding a whole nother layer, a whole
14 nother hearing to the process, and that's the reason we needed
15 your input, because we have magistrate judges who work for the
16 district court judges who are receiving orders saying, You
17 need to have defense attorneys at this bail review hearing
18 that none of us ever believed was even required, and so the
19 magistrates are saying, What do we do? We're not having bail
20 review hearings; we're having individualized assessments under
21 1517 with the financial affidavit, with the risk assessment;
22 we're doing that, but now they seem to be talking about this
23 new bail review hearing that we're not doing and we don't
24 really have a mechanism for doing and we don't understand how
25 to implement it. That's the real -- that's why I said that's

1 the immediate problem. The other issues are smaller and not
2 time sensitive, but that's a problem.

3 THE COURT: Okay.

4 MR. HUDSON: If I may, Your Honor.

5 THE COURT: Hold that thought for just a second.

6 Maybe you can't answer this, and if you can't, that's
7 fine. Is there any sense of conflict between the Office of
8 the Attorney General and your clients the Dallas County felony
9 district judges?

10 MR. HUDSON: I guess in what regard, Your Honor?

11 THE COURT: This is ancient history, and I'm showing
12 my age, and times were very different then.

13 There was some litigation involving judicial elections,
14 and Dan Morales was the Attorney General at the time, and all
15 of the district judges in Dallas at the time pretty much were
16 elected republicans, and there was a concern by the judges
17 that the Attorney General might not necessarily share their
18 strategic views in the litigation and, as a consequence, they
19 retained separate counsel and intervened. I was one of the
20 separate counsel; this is why I know about that. And there
21 was actually a good bit of a conflict between the position of
22 the Attorney General and the local state officeholders.

23 And I'm -- we've got exactly the mirror image of that
24 right now, and I'm just wondering is that feeding into this in
25 any way, or is there just really a family feud between Dallas

1 County and its felony judges and its county judges.

2 MR. HUDSON: No. I think -- if I can just -- in
3 terms of the conflict, we vetted that with our office. I
4 can't really get into the details of that because, obviously,
5 that's attorney/client privilege and work product.

6 What I can comment on is, the County's position right
7 now, if you read the orders for modification that they
8 previously filed, they indicated that they read the Court's
9 order as requiring two hearings. This Court adopted the
10 O'Donnell language. I pointed that out in the bench memo.
11 There's a magistration, then there's 48 hours later a hearing.
12 Right? So there's two hearings. Right? The magistration,
13 there's no attorney, there's no DA, there's only magistrate
14 and the person that comes in.

15 MS. DAVID: Are you talking about in Houston?

16 MR. HUDSON: The County wants to come in and stick
17 counsel at the 1517 hearing, and what they're trying to say is
18 that they want the Court to amend the injunction to require
19 the felony judges to provide counsel at a magistration
20 hearing. So what they're really trying to do is use this
21 Court's injunction as a bludgeon for the felony court judges
22 to require them to give counsel--something that is not at
23 issue in this litigation. So the modification to move down to
24 one hearing is really just a maneuver by the County, by
25 Plaintiffs' counsel, to force another requirement on the

1 felony judges that doesn't currently exist.

2 THE COURT: It doesn't cost your guys anything,
3 though, does it?

4 MR. HUDSON: Well, that's not really the issue, Your
5 Honor. The question is whether you have jurisdiction to
6 modify the injunction. Whether it costs us anything or not,
7 the reality is that if this Court requires us to provide
8 counsel, there's no claim or requirement that would provide
9 counsel at magistration.

10 If the County's modification, clarification, whatever you
11 want to call it, is approved by this Court, really what you're
12 doing is setting up a system where the County's going to come
13 back and say, We can't carry out the hearing we're carrying
14 out the way we want to carry it out because the felony judges
15 won't give us lawyers.

16 MS. DAVID: Your Honor, we are not asking for that
17 at all. I don't know where the confusion is, but if you read
18 our motion to modify, we are never asking that you order
19 counsel at this first hearing. We don't believe it's
20 constitutionally required. We would love to do it, we think
21 it's the best practice, we've committed funds to do it,
22 absolutely, but we know that we cannot do it without the
23 district court judges.

24 And he referred to Harris County. I just want to clear
25 it up. That is not the process in Harris County. In Harris

1 County, there is -- what we're asking the Court to say this
2 order means, there's one hearing before a magistrate and they
3 do have counsel there--but that's not at all what we're asking
4 you to order here, that's something that wasn't ordered by
5 Judge Rosenthal either, the parties did it voluntarily--and
6 then they have a bail review hearing in front of the sitting
7 judge. Only two hearings. Only two hearings. We're not
8 asking you to do anything different here, and we're not asking
9 you to order counsel at the initial hearing, because we don't
10 think it's constitutionally required. We would love to do it.
11 We think it's the best practice; that's it.

12 MR. HUDSON: And this Court would be in a position,
13 if you said you get to have the one hearing, once you bring in
14 a DA and a public defender, now it's at an adversarial and
15 critical stage which triggers counsel, which counsel at this
16 table is down in Galveston County arguing right now is a
17 violation of the Sixth Amendment.

18 So, as I said in my bench memorandum, this whole thing
19 seems geared toward basically forcing the felony judges to
20 give the County and the Plaintiffs what it is that they're
21 looking for. We don't believe that's the status quo, and in
22 amending or clarifying your order to require the single
23 hearing basically creates a brand new claim.

24 THE COURT: Okay. Oh how quickly we've gotten into
25 the merits of this. But that's okay; we need to chat about

1 that at some point.

2 You touch on an issue that I wanted to raise at some
3 point, and that's that you seem to be advocating for having a
4 lawyer in the room to speak on behalf of the defendant without
5 actually appointing that lawyer as counsel for the defendant.
6 It's kind of a, Well, we've got somebody here who can say
7 stuff for you, but they're not really appointed as your
8 attorney, and they can quit representing you tomorrow and they
9 don't have to have leave of court, and they're not really
10 entering into an appearance, and we don't have to worry about
11 potential conflicts with the Public Defender representing
12 multiple defendants when there is inherently a conflict
13 because this is really just bail, so we don't really need to
14 look too closely at whether we're really creating an
15 attorney/client relationship. Am I just totally off base, or
16 are we just finessing some of those issues?

17 MS. DAVID: No, it's a little different. I mean,
18 that's -- so the appointment is the reason that we have an
19 issue. We don't believe we can do the scenario that you just
20 laid out where there's a lawyer there who's not appointed a.
21 And the magistrate judges do not have the authority
22 statutorily to appoint counsel, so the only way we could have
23 counsel there is if the district judges did an across the
24 board order, like they've done Harris County and Bexar County
25 saying, We're going to appoint counsel at these hearings if

1 the defendant can sense and, you know, sign something saying
2 it's for this limited purpose, and we deal with all the
3 conflict issues, which the public defender has to deal with in
4 other situations as well.

5 But we have not even gotten to that point and we haven't
6 vetted all that because we all agree that under the statute,
7 the only way they can do this, carry out this role, is if
8 they're appointed by the district court judges. That's their
9 decision. They don't want to do that. That's fine, we can't
10 make them do it, but we're not going to do what you're talking
11 about doing and just throw lawyers in there. I mean --

12 MR. HUDSON: Well, actually if you read the order
13 that's referenced in the bench memorandum that she also
14 pointed out was attached to one of their recent filings, the
15 felony judges -- so two things. First off, it's not just
16 felony judges that appoint, it's also county judges, so I'm
17 not really sure why the felony judges are being singled out in
18 this scenario. That notwithstanding, the felony judges issued
19 an order that complies with your injunction that says, At
20 hearing number one, the magistration, no appointment. At
21 hearing number two, the 48-hour hearing, you get limited
22 representation for purposes of that bail review hearing. That
23 satisfies the two hearings that are set out in the *O'Donnell*
24 model language that this Court incorporated. We've already
25 entered that order.

1 Ironically, the County doesn't want to do it that way,
2 which this Court declares the policymaker, but for some reason
3 the county won't adopt our policy, and so now we're in the
4 position of they don't like what we're doing, so they're
5 trying to amend the injunction to basically overrule the order
6 that the felony judges entered. And that's really where we
7 are.

8 MS. DAVID: And that's where the confusion is, is
9 that the County's reading of your order is that that second
10 hearing he's talking about, the bail review hearing in the
11 jail, it doesn't exist; that's not the status quo; we don't
12 have that hearing. We have an individualized hearing before a
13 magistrate, 1517 hearing, that happens within 48 hours, well
14 within--they're very fast; and then after that if someone is
15 still in jail on a bail they can't afford, that triggers the
16 right to the adversarial bail review hearing that's before the
17 sitting elected judge. They appointed counsel for a bail
18 review hearing before a magistrate in the jail which we're
19 saying that's not even in the order, in your order, that
20 doesn't exist, and so we can't do that. So that's where the
21 confusion is. We read the order differently.

22 MR. HUDSON: But there is no confusion. Basically
23 the County's not conceding that they're out of compliance with
24 the Court's order. The Court has a temporal -- if you look --
25 I don't see how you can read the injunction -- if you have a

1 second hearing within 48 hours, I don't see how you can read
2 the injunction that you adopted and that exists in *O'Donnell*
3 as saying there's only one hearing. Right? It can't be that
4 Hearing A and then, if necessary, a 48-hour hearing is not a
5 second hearing. And then there is a third adversarial hearing
6 in front of the felony judges or the misdemeanor judges if the
7 person remains in jail after that occurs. That's three
8 hearings--magistration, bail review within 48 hours, felony
9 judge or misdemeanor judge.

10 And so in this case, honestly, Your Honor, it feels like
11 the County is just trying to sow confusion because they want
12 the amendment that they want, not because there's any need to
13 clarify or modify this Court's order.

14 MS. DAVID: And Your Honor, he keeps referring to
15 *O'Donnell*. There are not three hearings down there. And it
16 might make sense--I don't know what the logistics would be for
17 this--for you to call Judge Rosenthal and talk to her about it
18 if that would be helpful, if you don't trust us or the
19 Plaintiffs.

20 But -- or, I mean, the order, your own -- your injunction
21 says basically if a defendant has executed an affidavit
22 showing inability to pay and then they're not released,
23 they're entitled to a hearing within 48 hours in which an
24 impartial decision-maker conducts an individual assessment of
25 whether another amount of bail or condition provides

1 sufficient sureties. That hearing is happening. That's the
2 1517 hearing before the magistrate. But then the magistrates
3 aren't then reviewing that decision again. That's then going
4 to the judge of record the next day which --

5 I mean, you might want to get Plaintiffs' point of view.
6 That's how we read it. We think that's what's required.
7 That's how everyone in Houston reads it. That's how Judge
8 Rosenthal reads it. That's the way it's being -- it's
9 operating in Houston. And then we get an order from the
10 district court judges saying, Now you have -- I mean, we're
11 appointing counsel for this bail review hearing that happens
12 in the jail that no one understands what that means. And so
13 that's why we're all here and confused.

14 THE COURT: Okay. Do Plaintiffs want a turn?

15 MS. COHN: Thank you, Your Honor.

16 All right. So I just thought it might be helpful to
17 clarify quickly our understanding of the order which aligns
18 with the County's understanding of the order.

19 The provision at issue is Provision 8. And on page 4 it
20 explains that if a defendant has executed a financial
21 affidavit showing inability to pay and the magistrate does not
22 order release, that person is entitled to a hearing within 48
23 hours of arrest with an individualized assessment of bail.

24 Thereafter, if we skip down a little bit, if the
25 decision-maker declines to lower bail from an amount the

1 person can afford, or impose an alternative condition of
2 release, then there must be written factual findings and the
3 County must provide a formal adversarial bail review hearing.

4 So I think what's been described here is that when
5 somebody is booked into Lew Sterrett jail, the process
6 currently is that they're asked to fill out a financial
7 affidavit, and then before 48 hours, typically within 24
8 hours, they're going before a magistrate judge for what the
9 County is calling an Article 1517 hearing; what we had talked
10 about in the sort of course of litigation during that
11 preliminary injunction hearing is the magistration. And at
12 that time the magistrate is considering the financial
13 affidavit and determining what bail setting should be issued.

14 After that, if somebody cannot bail out, then they are
15 booked into the jail. And at that point our understanding is
16 this formal adversarial bail review hearing kicks in.

17 So our understanding with the processes currently in
18 place at the County, the sort of description here about the
19 affidavit, the financial affidavit and the individualized bail
20 hearing is sort of being combined as one at this Article 1517
21 hearing, and that individuals should be eligible for a formal
22 bail review hearing thereafter.

23 I would also point the Court to the felony judges' order
24 which was filed as Docket 191-1, which appoints counsel for
25 the purpose of a bail review hearing following the

1 individualized bail assessment and initial appearance. So the
2 felony judges' order, as we understand it, appoints counsel
3 for that sort of later bail review hearing identified in
4 Provision 8 that's before a felony or misdemeanor judge.

5 And certainly we agree with the County that we would be
6 -- we're very glad that the County appointed funds for public
7 defenders to be available at the magistration, and certainly
8 we do agree that that would be the best practice, but we have
9 not raised a Sixth Amendment claim in this case, unlike
10 another case that counsel for the felony judges raised.

11 So all that to say, I don't think that the felony judges'
12 argument that this is an attempt to shoehorn the felony
13 judges' order, which is filed as 191-1, into some other
14 hearing is an accurate characterization of that order.

15 THE COURT: Okay.

16 MS. COHN: Thank you.

17 THE COURT: While you're up there, you also I
18 believe still have, although it's limited, your own motion
19 that the County has not joined in. Do you want to go ahead
20 and address that now?

21 MS. COHN: Sure. Absolutely. Thank you.

22 All right. So that motion was re-filed yesterday as 195,
23 an amendment to replace Docket No. 169. We withdrew the
24 majority of the request for clarification in Docket 195, and
25 so there are only two remaining, and those two concern

1 language in Provision 13 and then language in Provision 8. So
2 I'll address the language in Provision 13 first.

3 Provision 8 says that there are certain categories of
4 people that don't have access to this individualized
5 consideration and this formal adversarial bail hearing. The
6 reason is is because they have either this--this is at ECF 165
7 at 3--formal holds preventing a release from detention,
8 pending mental health evaluations, or pretrial preventative
9 detention orders. Essentially those people are otherwise
10 ineligible for bond, and so they don't need individualized
11 consideration of their release.

12 It's possible, though, that those conditions could go
13 away; that somebody's hold could be lifted. And what we've
14 asked for clarification on is that at the point at which that
15 hold is lifted, that the person would be treated just like any
16 other arrestee, booked into Lew Sterrett jail, and would be
17 provided with an individualized bail hearing within 48 hours.

18 And, you know, we believe that's a natural reading, it's
19 a natural consequence of the order, but the County Defendants
20 -- and the County Defendants have agreed that they should be
21 given a timely hearing, but argue that sort of applying this
22 48-hour rule that applies to every other arrestee, it would be
23 just too inflexible.

24 THE COURT: What if we said two business days?

25 MS. COHN: Well, Your Honor, I think that the issue

1 here is that as soon as that hold is lifted it's -- I guess we
2 can think of it sort of as if that person has been booked into
3 jail for the first time. They certainly haven't; and they've
4 been in jail, but theoretically, you know, if the hold is
5 lifted they should be treated just like any other arrestee
6 being booked into the jail.

7 THE COURT: Their issue, as I understand it, in part
8 at least, is some of this may be nights and weekends and it's
9 just not realistic for us to try and turn that around within
10 48 chronological orders, but it sounded to me like if you gave
11 them two business days they wouldn't be anxious about that.

12 MS. COHN: Well, Your Honor, I have questions about
13 that because the registrations occur 24 hours a day, seven
14 days a week, and what the COUNTY, you know, was representing
15 earlier --

16 THE COURT: If I can -- this may not be what they're
17 saying, but this was what I came away with, so maybe they can
18 educate me. They're not actually being booked in, and the
19 procedures that are normally triggered by somebody being
20 booked aren't necessarily immediately triggered by one of
21 these other contingencies going away; it's just not part of
22 their workflow, and then if that happens on a weekend there's
23 not a real gracious way to merge the two. And I'm not sure it
24 would cause your folks huge heartburn if it were two business
25 days, and that might fix their problem and then you-all are

1 happy and smiling and everybody's good. I don't know. I'm
2 just offering that as a possibility. You might think about
3 that some.

4 MS. COHN: Sure. We can discuss it.

5 THE COURT: All right. And do you want to go on to
6 Provision 10?

7 MS. COHN: Absolutely.

8 So the second provision is Provision 10. This relates to
9 the reporting requirement. We appended the first two weekly
10 reports, which Your Honor received from the County via email,
11 and those sort of go over what is currently being reported.
12 So as you see in the reports, it shows the total number of
13 people who were held beyond 48 hours, the date and time that
14 they were booked into the jail, the date and time at which
15 they received their 1517 hearing --

16 THE COURT: And you want a bunch of other stuff. I
17 understand that.

18 MS. COHN: Sure. And so our concern is that to be
19 able to -- if the purpose of the requirement is to be able to
20 monitor the implementation of the order, there's additional
21 information that's necessary to understand what's happening.
22 And so some of that information which is outlined in Provision
23 10 is, for example, how many arrestees are receiving a
24 financial affidavit and reasons for, for example, somebody
25 being held longer than 48 hours.

1 THE COURT: When I read this, it struck me as
2 seeming very familiar as a discovery dispute. We're fighting
3 over how much they have to do. I assume you-all talked and
4 tried to see if you could work out some compromise and those
5 efforts were unavailing. Is that correct?

6 MS. COHN: We did; yes, Your Honor. We had
7 initially thought that that we would be able to resolve this
8 by agreement, and we were unable to do so. We do have a
9 discovery conference scheduled for next week so that we can
10 begin the discovery process. But because these reports are
11 ongoing, we think it's important that this information is
12 included in those reports separate and apart from sort of a
13 rolling discovery request.

14 THE COURT: Okay. Just a -- this is a trivial,
15 petty personal issue. Do those need to come to us, or is it
16 just sufficient if they go to you? The reports.

17 MS. COHN: Well, if the Court is interested in that
18 information to be able to monitor the order, certainly they
19 can come to you.

20 THE COURT: Bluntly, no. No. I've got other stuff
21 to do. I've got a couple of other cases. I assume if there's
22 anything in there that I need to do something about, that
23 you'll call it to my attention, and unless you call it to my
24 attention, I don't actually need to read those things. So it
25 seemed to me like it would probably be sufficient if you could

1 just work out something where they provide them to you.

2 If you feel a need to tender them to the Court, I think
3 the easier thing to do is just docket them on ECF, and then
4 the whole world can see them if you think that's beneficial.
5 But just mailing them to us, we don't -- what do we do with
6 them? Put them in a file; in A drawer? Then we won't find
7 them later. I'll have forgotten which drawer I put them in by
8 then.

9 So I know you-all are going to talk about other stuff,
10 but you might think about that--is it enough just to provide
11 them to you and, if not, maybe you can just docket them on
12 CM/ECF and then everybody gets them if any of the other
13 litigants want that as well.

14 MS. COHN: Absolutely. We'll discuss that.

15 The last thing I just wanted to mention related to
16 jurisdiction, and I know that you've already determined that
17 you'll be denying these without prejudice, there is also an
18 option that the Court can defer consideration under Federal
19 Rule 62.1(a)(1) for indicative rulings, and so I wanted to
20 bring that to your attention.

21 THE COURT: Yeah. And that's why I paused when the
22 County said, You need to deny it, and I wondered if I could
23 just punt on that; but from their perspective if it's cleaner
24 to have a denial to go to the Circuit, if it's without
25 prejudice I don't think it hurts anybody, so let's give them

1 that comfort.

2 MS. COHN: Okay. Thank you, Your Honor.

3 THE COURT: Does the County want to be heard on the
4 Plaintiffs' stand-alone motion for clarification?

5 MS. DAVID: Yes; just briefly.

6 Your Honor was correct about the workflow issues. That
7 is a major problem. The other problem is that sometimes these
8 people are taken to medical facilities, and so right when
9 their medical issue or mental health issue is cleared up
10 they're not in the jail, so they have to be transported back
11 to the jail.

12 THE COURT: So if they say to you, 48 hours, no;
13 what we meant was two business days.

14 MS. DAVID: That's better.

15 THE COURT: Are you happy then?

16 MS. DAVID: Yeah. I think that's much more
17 workable. And that's also helpful because, depending on how
18 long this has been going on, the case is probably pending in
19 front of the actual elected judge and they're not there on the
20 weekend, so it doesn't make sense to take them to a magistrate
21 when they already have counsel and all of that, if that's the
22 situation.

23 THE COURT: Okay. Well, please explore with the
24 Plaintiffs if that split the baby works for you-all.

25 MS. DAVID: We will We will explore that.

1 And then the only other thing I wanted to bring up on the
2 discovery is, I think part of the reason that there's been
3 some issues is because we were waiting to have the Rule 26(f)
4 conference until after the rulings on the motions to dismiss.
5 Do you have any concern with us going forward while we're
6 waiting on the Fifth Circuit?

7 THE COURT: No, no. By all means.

8 MS. DAVID: Okay.

9 THE COURT: My -- some litigants appear to me to
10 believe that the pendency of a motion to dismiss automatically
11 stays a case, and I've looked and I don't see anything that
12 says that, so by all means press on.

13 MS. DAVID: Okay. Thank you, Your Honor.

14 THE COURT: Okay. Misdemeanor judges' request for
15 clarification, does anybody want to talk about that?

16 MS. DAVID: Yes. So we have two issues on that.
17 One I believe the Plaintiffs are in agreement with and that is
18 simply, to be clear, that where the order says -- again, we're
19 in Paragraph 8, which seems to be where everything is. On
20 page 4 kind of towards the bottom, where it requires a formal
21 adversarial bail review hearing before a misdemeanor or felony
22 judge, we just wanted clarification that, like all matters,
23 that that could be referred to a visiting judge if, say, the
24 misdemeanor or felony court judge are in trial, that sort of
25 thing. And the Plaintiffs seem to have no problem with that.

1 THE COURT: So if we say "or designee," does that
2 cover it?

3 MS. DAVID: Right. Yes. That's that.

4 And then the other issue is the second hearing, whether
5 that is required even if the defendant and the defendant's
6 counsel do not want to have that hearing, and the order --

7 THE COURT: I'll tell you my reaction to that, and
8 you can educate me if I'm misunderstanding. Their concern
9 was, in part, that an unrepresented defendant might not know
10 to ask for the hearing, and your concern appeared to me you
11 shouldn't require a hearing if they want to waive it.

12 MS. DAVID: Yes.

13 THE COURT: And it occurred to me that maybe I could
14 do something to the effect of there presumptively is a
15 hearing, subject to waiver.

16 MS. DAVID: Yeah. That's certainly an option.

17 THE COURT: Does that fix --

18 MS. DAVID: It fixes most problems.

19 I mean, so in Dallas County the way it works is if
20 someone requests counsel, that counsel is appointed within one
21 business day of the magistration, and that counsel who's
22 appointed is given a notice saying, Hey, you need to ask for
23 this hearing if you want it. And right now we're
24 automatically having the hearings, but we would prefer for
25 them to say, Yes, we want it, or no, we don't.

1 And then the other situation that the Plaintiffs actually
2 point out in their footnote is that some arrestees are hiring
3 private counsel, and then it takes them a while to get their
4 counsel or their counsel is busy, and so then we have the
5 hearing the next business day and there's no one there
6 representing them because their counsel is busy or hasn't been
7 hired or whatever, and so we would prefer not to have a
8 hearing where they're not represented because their counsel
9 didn't get the notice. It's not as much a problem with
10 appointed counsel as it is with private counsel, if that makes
11 sense. Just having an automatic hearing that they don't know
12 about it made us a little squeamish.

13 THE COURT: This sounds cold, and I don't mean it to
14 sound cold, but my immediate reaction is kind of isn't that
15 between the defendant and their retained counsel? If they're
16 retaining counsel, why don't they get their retained counsel
17 to show up? And if their retained counsel is too busy to show
18 up, maybe they shouldn't have hired that lawyer.

19 MS. DAVID: That is one problem, but the other
20 problem is the load on the courts of having these hearings if
21 they don't really serve any purposes in that situation where
22 the lawyer didn't show up and -- but we're still holding the
23 hearing, and it's taking up time and judicial resources and
24 all of that. It's a lot of people.

25 THE COURT: Okay. Anything else on that motion?

1 MS. DAVID: No, Your Honor.

2 THE COURT: Okay. Do Plaintiffs want to be heard on
3 that one?

4 MS. COHN: Thank you, Your Honor. I'll be brief.

5 With regard to the first issue that the County raised,
6 the visiting judge, as we outlined in our joint motion for
7 clarification, Docket 194, we agreed to that so long as the
8 visiting judge receives training on the risk assessment tool
9 and using the capability of Pretrial Services. We think it's
10 very important that if there is a visiting judge, that that
11 person understand the pretrial process in Dallas County so
12 that they can appropriately weigh the information before them.

13 THE COURT: I think it's always good for the
14 visiting judges to know what they're doing.

15 MS. COHN: On the second request concerning the
16 automatic hearings, our concern, which I think you articulated
17 well, is that the presumption here should be that people are
18 receiving these hearings and, you know, in the limited
19 circumstances where they don't require them should be able to
20 waive them. But I think, by and large, that means the
21 majority of people should have access to these hearings.

22 THE COURT: Okay. So you're good if it's
23 presumptively there's a hearing, but the litigant or their
24 counsel can waive it.

25 MS. COHN: Yes.

1 THE COURT: That's okay with you.

2 MS. COHN: Yes, that's fine with us.

3 THE COURT: All right. Good.

4 I'm not 100 percent sure, but I think I've covered all of
5 the requests for modification in front of me. Did I miss
6 anything?

7 MR. HUDSON: If I could just add one thing to that,
8 Your Honor.

9 THE COURT: Sure.

10 MR. HUDSON: I know the Court is saying presumptive
11 hearings. I'm not really sure how the misdemeanor judges are
12 set up in Dallas County. We didn't join in the motions. We
13 thought -- frankly, we thought the order was pretty clear.
14 But rather than the presumptive hearings -- if I may approach,
15 Your Honor?

16 THE COURT: Yes.

17 MR. HUDSON: We provided a notice to the County. It
18 strikes to us that if somebody has appointed counsel, which
19 we've offered to do, we've actually asked the County to hand
20 out a notice at the magistration to everybody that comes in
21 there so that they have notice that they are entitled to a
22 hearing. We've also been attempting to work with the County
23 so that every appointment email that goes out includes the
24 same notice for appointed counsel. And so from our
25 perspective, the problem of the person not knowing that

1 they're entitled to a hearing is really not an issue so long
2 as the County does what the felony judges have asked and just
3 provide the notice.

4 THE COURT: I think you may be ascribing a greater
5 degree of sophistication to some of the defendants than they
6 may have.

7 MR. HUDSON: Well, no, Your Honor, I'm not. That's
8 why I thought the notice would have been appropriate because
9 the notice said that they're entitled to the hearing, and so
10 at that point -- I mean, you just heard from the County that
11 appointed counsel comes within 24 hours in most cases. I
12 mean, at a minimum if they the appointed counsel within a day,
13 the appointed counsel who also received the notice should be
14 able to talk to the person about whether they want an
15 adversarial hearing.

16 THE COURT: Okay.

17 MR. HUDSON: And so rather than set a presumptive
18 hearing and create a workload that may or may not be
19 necessary, we would suggest that the Court need not to the
20 amend the injunction and just, if anything, require that the
21 notice be served.

22 THE COURT: Okay.

23 MS. COHN: Your Honor, may I briefly respond?

24 THE COURT: Oh so briefly.

25 MS. COHN: I'd also like to raise just the concern

1 that even if a defendant may know that they are entitled to
2 that hearing, there is not a clear process to request that
3 hearing. They are in the custody of the Sheriff's Office and
4 the jail, and so the Sheriff's deputies are not trained on how
5 someone would go about requesting that -- or putting in that
6 request I think we have a logistical problem.

7 Thank you, Your Honor.

8 THE COURT: Fair enough.

9 Okay. Did I miss anything?

10 All right. They may file a joint pleading with the
11 Circuit to clarify whether or not I can or should do anything.
12 Are you going to oppose that, do you think?

13 MR. HUDSON: I need to take a look at what they file
14 first, Your Honor, but my guess is probably yes.

15 THE COURT: Okay. Well, it may take a little longer
16 if it's an opposed motion, but I still think they move pretty
17 quickly on that stuff.

18 All right. Thank you-all very much for coming down.
19 This was very helpful. I appreciate it.

20 For those of you traveling, safe travels home.

21 The Court will stand in recess.

22 (End of hearing.)

23

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts

02/07/2019

10 _____DATE_____
11 SHAWN McROBERTS, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER

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